

## **Rule 8, Ariz. R. Crim. P.**

### **SPEEDY TRIAL — Continuances because of witnesses' or attorneys' vacations — Revised 11/2009**

A police officer's vacation or other commitment may justify a continuance; however, "the State must show better reasons than a bare allegation of a 'vacation conflict' in order to justify a continuance." *State v. Strickland*, 27 Ariz.App. 695, 696-97, 558 P.2d 723, 724-25 (App. 1976); *State v. Corrales*, 26 Ariz.App. 344, 548 P.2d 437 (1976). In *State v. Vasko*, 193 Ariz. 142, 971 P.2d 189 (App. 1998), the State was prepared to take the case to trial when the case was placed in case transfer for reassignment to another judge for trial. Before any trial date had been established, the prosecution asked the trial court not to set a trial date during a three-week period for which the arresting officer's Army Reserve duty was scheduled. The trial court reset the trial to a new date after the officer's duty ended, making the new trial date after the original "last day" for trial. The trial court excluded the time from the Rule 8 calculation and set a new "last day." *Id.* at 144 ¶ 6, 971 P.2d at 191 ¶ 6. On appeal, the defendant argued that the trial court abused its discretion by granting a continuance because of the officer's unavailability, arguing that under *State v. Heise*, 117 Ariz. 524, 526, 573 P.2d 924, 926 (App. 1977), the State should have foreseen and avoided the scheduling conflict. The Court of Appeals disagreed, noting that the State was ready to proceed when the case was placed in case transfer. The State was not responsible for the delay caused by case transfer, nor could the State have foreseen and avoided that conflict. "Ordering a continuance under these circumstances was therefore not an abuse of discretion." *Vasko*, 193 Ariz. at 145 ¶ 11, 971 P.2d at 192 ¶ 11 (App. 1998).

The vacation schedule of an essential prosecution witness may justify a continuance if the prosecution acts promptly to request a continuance as soon as the prosecution becomes aware of the conflict. In *State v. Heise*, 117 Ariz. 524, 573 P.2d 924 (App. 1977), the doctor was an essential witness for trial having performed the autopsy on the victim. The doctor notified the prosecutor over a month before the original trial date that he would be on vacation during a particular two-week period. However, the court continued the trial on its own motion to a date during the doctor's vacation. The prosecutor waited until the trial date to move to continue the case on the grounds that the doctor, an essential witness, was unavailable. Over the defense's objection, the trial court granted the motion and excluded the time from the Rule 8 calculation. The defendant was convicted and appealed, arguing that his speedy trial rights under Rule 8 were violated. The Court of Appeals found that the State had not shown "extraordinary circumstances" justifying a continuance, reversed the manslaughter conviction, and remanded the case to the trial court with orders to dismiss the case with or without prejudice. The Court noted that the doctor was not to blame because he had "timely and dutifully notified the prosecutor of his vacation schedule and at that time the expected trial date did not interfere." The Court went on:

The prosecution did not bring this matter to the attention of the trial court, when the court apparently on its own motion moved the trial date from [a date when the doctor was available to a date during his vacation]. Rather, the prosecutor waited until the day of trial to urge the motion for continuance. Waiting until this time to urge the motion where the prosecutor had prior knowledge of the grounds for the motion, rendered the motion untimely under Rule 16, Rules of Criminal Procedure.

*State v. Heise*, 117 Ariz. 524, 525, 573 P.2d 924, 925 (App. 1977).

The Court recognized the trial court's broad discretion in ruling on continuances, and the difficulty the trial court had faced in ruling under the circumstances of the case:

The exercise of that discretion becomes particularly hard under circumstances such as existed in this case, that is, where the denial of the continuance would in all probability result in the dismissal of the prosecution because it would be unable to proceed but where the granting of the continuance results in Rule 8 time limitations being violated. In the vast majority of cases, we would not fault the trial court for coming down on the side of granting a continuance. However, when the sole reason the trial court is placed in this dilemma is the failure of the prosecutor to keep track of its trial schedule and availability of witnesses, we must reluctantly conclude that the trial court abused its discretion in finding the existence of extraordinary circumstances

*Id.*

An alternative to continuing a trial for an expert witness's vacation is to take a videotaped deposition of the witness and present the videotape at trial. *State v. Reid*, 114 Ariz. 16, 559 P.2d 136 (1976), *cert. denied*, 431 U.S. 921 (1977). This procedure was used in *State v. Vaughn*, 163 Ariz. 200, 205, 786 P.2d 1051, 1056 (App. 1989), and the Court of Appeals upheld the use of the videotaped deposition at trial:

The trial judge did not err by admitting the video deposition. The admission of video deposition evidence of an expert witness who is on vacation is permissible. [citation omitted] The doctor's statement was taken under oath and he was subject to cross-examination.

The courts have granted defense attorneys continuances to accommodate a previously planned vacation, even when the defendant objects and refuses to waive time. See, e.g., *State v. Rickman*, 148 Ariz. 499, 501, 715 P.2d 752, 754 (1986). A prosecutor's vacation, however, is ordinarily not sufficient to justify a trial continuance. In *State v. Corrales*, 26 Ariz.App. 344, 345, 548 P.2d 437, 438 (App. 1976), the Court of Appeals stated that a prosecutor's vacation "is not an extraordinary circumstance,"

reasoning, "It is the prosecutor's duty to see that his trials are not scheduled during his vacation or to make arrangements for someone else to take the case."